

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF MCLEAN

SOUTH CENTRAL JUDICIAL DISTRICT

_____	)	
<b>Public Service Commission</b>	)	<b>CIVIL NO. _____</b>
	)	
<b>Petitioner,</b>	)	
	)	
<b>vs.</b>	)	
	)	<b>APPLICATION FOR</b>
<b>Falkirk Farmers Elevator Co.</b>	)	<b>APPOINTMENT AS</b>
	)	<b>TRUSTEE AND FOR</b>
<b>Respondent.</b>	)	<b>EX PARTE ORDER</b>
_____	)	
<b>PSC Case No. GE-12-769</b>	)	
_____	)	

The North Dakota Public Service Commission (commission) alleges as follows:

1.

Falkirk Farmers Elevator Co., a North Dakota cooperative association authorized to do business in North Dakota, operated licensed grain warehouses at Falkirk, North Dakota until September 6, 2012, and at Hazen, North Dakota, until August 1, 2012, under North Dakota Century Code chapters 60-02 and 60-04.

2.

Falkirk Farmers Elevator Co. operated grain warehouses at Falkirk, North Dakota, under license number 128 and at Hazen, North Dakota, under license number 1175.

**3.**

A surety bond covering both locations is on file with the commission as required by North Dakota Century Code section 60-02-09. The surety bond is for \$380,000 and identified as number 141552626 with Western Surety Company, PO Box 5077, Sioux Falls, South Dakota, 57117-5077, as surety.

**4.**

On October 10, 2012, the commission received a letter with attachments from Monty Fast, Turtle Lake, North Dakota, alleging that he has not been fully paid for grain he sold to Falkirk Farmers Elevator Co. A true and correct copy of the claim is Exhibit A to the Affidavit of Susan K. Richter, attached.

**5.**

On November 9, 2012, the commission received an electronic copy of a letter from Mike Guenthner, President of Falkirk Farmers Elevator Co. advising that Falkirk Farmers Elevator Co. recognizes that under the provisions of the North Dakota Century Code Falkirk Farmers Elevator Co. may be deemed to be insolvent, in that it is unable to fully pay for grain sold. A true and correct printed version of the letter received electronically is Exhibit B to the Affidavit of Susan K. Richter, attached.

**6.**

As evidenced in Exhibit B to the Affidavit of Susan K. Richter, Falkirk Farmers Elevator Co. requests that the commission seek application to secure appointment under the laws of the State of North Dakota and to act as the trustee for the benefit of the stakeholders. Falkirk Farmers Elevator Co. waives its right to notice of hearing on

the commission's application to the district court, and consents to summary action by the court to appoint the commission as trustee.

7.

The commission was informed and has reason to believe that there are outstanding obligations for grain sold to Falkirk Farmers Elevator Co. as a public warehouseman under North Dakota Century Code chapter 60-02. Under the provisions of North Dakota Century Code section 60-02-09, bond protection is available for the benefit of all persons storing or selling grain in such warehouseman. Under the provisions of North Dakota Century Code section 60-10-04 a person is eligible to receive indemnity payments from the credit-sale contract indemnity fund if the licensed warehouse to which the person sold grain to becomes insolvent.

8.

Under North Dakota Century Code section 60-04-02. "A licensee is insolvent when the licensee refuses, neglects, or is unable upon proper demand to make payment for grain purchased or marketed by the licensee or to make redelivery or payment for grain stored." North Dakota Century Code chapter 60-04 specifies the process that applies when a licensee under North Dakota Century Code chapter 60-02 is insolvent.

9.

Falkirk Farmers Elevator Co. is insolvent under North Dakota Century Code chapter 60-04, in that it is unable upon proper demand to make payment for grain purchased or marketed by the licensee or to make redelivery or payment for grain stored.

## 10.

North Dakota Century Code section 60-04-03.1 provides:

### **60-04-03.1. Trust fund established.**

Upon the insolvency of any warehouseman, a trust fund shall be established for the benefit of noncredit-sale receipt holders of the insolvent warehouseman and to pay the costs incurred by the commission in the administration of this chapter. The trust fund must consist of the following:

1. The grain in the warehouse of the insolvent warehouseman or the proceeds as obtained through the sale of such grain.
2. The proceeds, including accounts receivable, from any grain sold from the time of the filing of the claim that precipitated an insolvency until the commission is appointed trustee must be remitted to the commission and included in the trust fund.
3. The proceeds of insurance policies upon grain destroyed in the elevator.
4. The claims for relief, and proceeds therefrom, for damages upon any bond given by the warehouseman to ensure faithful performance of the duties of a warehouseman.
5. The claims for relief, and proceeds therefrom, for the conversion of any grain stored in the warehouse.
6. Unencumbered accounts receivable for grain sold prior to the filing of the claim that precipitated an insolvency.
7. Unencumbered equity in grain hedging accounts.
8. Unencumbered grain product assets.

## 11.

On October 15, 2012, the commission sent Grain Warehouse Inspector Timothy Erdmann to Falkirk. The grain warehouse inspector confirmed that there were approximately 8,000 gross hundredweight of pinto beans in the Falkirk warehouse. On October 18, 2012, the commission sent Grain Warehouse Inspector Michael McNamee to an unlicensed facility in Cummings, North Dakota, owned by Cummings Ag of Buxton, North Dakota. The grain warehouse inspector confirmed that there were approximately 1,700 gross hundredweight of sample grade pinto beans stored in the Cummings facility on behalf of Falkirk Farmers Elevator Co.

**12.**

Delay in removing the beans from these facilities can jeopardize the quality of the beans thereby decreasing the value of the beans to the trust. Prompt action must be taken to maximize the value of the beans to the trust fund.

**13.**

North Dakota Century Code section 60-04-03 provides that the court may issue *ex parte* a temporary order to preserve or protect the assets of the trust fund until the court issues its order granting or denying the application.

**14.**

The commission is legally entitled to be appointed trustee of the trust fund provided under North Dakota Century Code chapter 60-04.

**15.**

Bond proceeds may be needed to redeem outstanding receipts issued by Falkirk Farmers Elevator Co. North Dakota Century Code section 60-04-03.3 provides:

**60-04-03.3. Joinder of surety – Deposit of proceeds.**

The surety on the warehouseman's bond must be joined as a party to the insolvency proceeding upon a motion by the commission when the commission believes that proceeds from the warehouseman's bond may be needed to redeem outstanding receipts issued by the warehouseman. When it appears in the best interests of the receipt holders, the court may order the surety to deposit the penal sum of the bond, or so much thereof as may be deemed necessary, into the trustee's trust account pending a final determination of the surety's liability under the bond.

**16.**

The commission is not requesting that the bonding company be joined at this time, but will request joinder of the bonding company at a later date if the commission believes bond proceeds are needed.

**17.**

Proceeds from the credit-sale contract indemnity fund may be needed to meet the licensee's obligations to any holders of credit-sale contracts not fully compensated in accordance with the contract. North Dakota Century Code section 60-10-05 provides:

**60-10-05. Credit-sale contract indemnity fund – Availability of money.**

Upon the insolvency of a licensed public warehouse or grain buyer and a declaration that the public service commission serve as the trustee, the public service commission shall make the proceeds of the credit-sale contract indemnity fund available for use in meeting the licensee's obligations with respect to the reimbursement of any person who sold grain to the licensee under a credit-sale contract and who was not fully compensated in accordance with the contract.

**18.**

The commission believes that it is in the best interest of the claimants and the parties to this proceeding that an ex parte order be issued by this court to preserve and protect the potential assets of the trust fund until the court issues its order granting or denying the application. Such an order is necessary to allow prompt action to preserve the value of the beans to the trust fund. Delay can jeopardize the quality of the beans and their value to the trust.

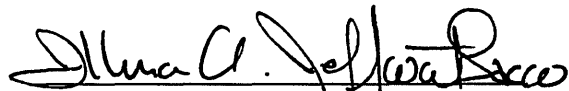
**WHEREFORE** the commission respectfully requests:

1. That the court declare Falkirk Farmers Elevator Co. **INSOLVENT** within the meaning of North Dakota Century Code chapter 60-04 and establish the date of insolvency as October 10, 2012, the date the first claim alleging nonpayment for grain sold was filed with the commission.

2. That the court **APPOINT** the commission as trustee of the trust fund under North Dakota Century Code section 60-04-03.
3. That the court issue *ex parte* a temporary **ORDER**:
  - a. Requiring Falkirk Farmers Elevator Co., to preserve and protect the trust assets under North Dakota Century Code section 60-04-03.1; and
  - b. Authorizing the commission to immediately take any action deemed necessary to preserve and protect the trust assets under North Dakota Century Code section 60-04-03.1.

Respectfully submitted at Bismarck, North Dakota, this 30<sup>th</sup> day of November,

2012.



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